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Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Robert Camp,

Petitioner,

v.

Phillip G. Ruffin, individually and/or d/b/a Harper Hand Trucks, Inc., and/or d/b/a Harper Trucks, Inc., and Harper Trucks, Inc.,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO PROCEEDING

The corporate entity named as a respondent in this case, Harper Trucks, Inc., has no parents or nonwholly owned subsidiaries.

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* * * *

Statutes and Rules

Fed. R. Civ. P. 8. 1

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

1. Whether the petitioner met the notice pleading requirements of Fed. R. Civ. P. 8 for stating a cause of action for breach of contract is irrelevant because the summary judgment evidence established that there was no written employment contract and, under Texas law, Camp's employment relationship with Harper was terminable at will.

2. In applying Texas law, the Court of Appeals correctly held that only "out-of-pocket" damages are available in Texas for a cause of action based on fraud and negligent misrepresentation.

3. Therefore, no substantial federal question is presented which would necessitate the granting of the Petition for a Writ of Certiorari.

ARGUMENT

I. The Trial Court Was Correct In Finding That There Was No Written Employment Contract Between Camp And Harper And, Therefore, There Was No Breach Of Contract Even If Camp Had Properly Raised It In His Pleadings.

In his First Amended Original Petition, which was properly removed to federal court on September 12, 1991, Camp asserted two separate and specific counts against defendants based upon theories of fraud and negligent misrepresentation. Nowhere in Camp's First Amended Original Petition did he include a cause of action for breach of contract. Camp did not seek damages for breach of contract or plead the necessary elements for breach of contract. Camp's discovery responses did not reveal any additional legal theories upon which Camp based his claims for recovery. Pursuant to the District Court's Status Report Order of September 17, 1991, Camp's counsel made no claim for breach of contract. He only claimed that, as a result of alleged promises to pay commissions made by the employer, he was fraudulently induced to accept employment.

The trial court found that the complaint did not put the defendants on notice of a claim for breach of contract.

This question was only raised at the summary judgment stage when it became apparent that the plaintiff could not satisfy the necessary elements for Texas common law fraud and negligent misrepresentation with the evidence adduced during discovery.

The United States Court of Appeals for the Fifth Circuit did not reach the question of whether Camp had adequately pled a breach of contract cause of action somewhere in his pleadings. The Circuit Court noted that, since undisputed summary judgment evidence showed that Camp came to work for Harper on February 15, 1988, and that there was no written employment contract between Camp and Harper setting forth the specific terms and conditions of his employment or specifying the length of his employment, Camp's employment relationship with Harper was terminable at any time for any reason at the will of either party. Collins v. McCombs, 511 S.W.2d 745-747 (1974); Travel Masters, Inc., v. Star Tours, Inc., 827 S.W.2d 830, 832-33 (Tex. 1991); Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 724 (Tex. 1991); Knowlton v. Greenwood Indep. School Dist., 957 F.2d 1172, 1180-81 (5th Cir. 1992).

Since Camp and Harper had an employment relationship terminable at will, there were no terms of a contract for Harper to allegedly breach. Thus, it was irrelevant whether Camp's pleadings stated a cause of action for breach of contract because there was no contract proven by Camp at the summary judgment stage.

Camp's Petition for a Writ of Certiorari does not seek review of a substantial federal question but, rather, review of the summary judgment evidence as to whether Camp's employment relationship with Harper Trucks was terminable at will under the law of the State of Texas. As the United States Court of Appeals for the Fifth Circuit observed, such a cause of action would amount to a breach of an unenforceable promise and would be barred by the Texas statute of frauds anyway. (See Petition for a Writ of Certiorari, APPENDIX C, Page 6.) For these reasons, Camp's petition should be denied.

II. The Court Of Appeals Was Correct In Applying Applicable State Law In Holding That Only "Out-Of-Pocket Damages" Are Recoverable In Fraud And Negligent Misrepresentation Claims Under Texas Law.

Camp admitted below that his claims for damages are based upon the alleged failure of Harper to fulfill alleged representations that Camp would receive a $200.00 a month increase after six months of employment and 2% commissions on sales of certain hand trucks to Wal-Mart Stores, Inc., and Sam's Wholesale Club, Inc. (collectively referred to as "Sam's") The undisputed summary judgment evidence is that Camp received commissions on sales of Harper Trucks' products in his territory, including sales to Sam's, throughout his entire tenure as an employee of Harper Trucks, Inc., on all accounts that were not deemed to be house accounts. Camp's efforts at making sales to Sam's of certain hand trucks manufactured by Harper

were unsuccessful, so Harper purchased a competing company, Kenmar, Inc., for the sum of $700,000.00 so that Harper could acquire the Sam's business for that particular line of hand trucks. No consideration of the purchase of Kenmar had been made prior to plaintiff's employment with Harper. The decision to purchase Kenmar was made some time in mid-1989, more than one full year after plaintiff began employment with Harper Trucks, Inc. The decision to designate sales generated from the Kenmar acquisition as a house account was made in July, 1989, and Camp was advised by a memo on August 2, 1989, that the sales of Kenmar trucks to Sam's would be considered a house account, and no commissions would be paid to Camp from sales of Kenmar trucks to Sam's. Harper did not pay commissions to sales representatives on house accounts and Camp was aware of this fact.

In this case, Camp does not seek to recover anything that he has parted with as a result of defendants' alleged fraudulent statements. Instead, Camp's "damages" as set forth in the summary judgment evidence consist solely of the expected profit that he hoped to gain from commissions on sales that he did not procure.

The district court held that the evidence before it failed to demonstrate detrimental reliance by Camp, a requisite element essential to his case and as to which Camp shouldered the burden of proof at trial. The district court summarized its analysis of Camp's fraud claim as

follows:

> The Court is of the opinion that Camp's fraud claim should be dismissed because he has failed to present summary judgment evidence of detrimental reliance. *See Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991) (holding that plaintiff must meet burden of proving that he acted to his detriment in reliance upon defendant's alleged representations to prevail on fraud claim). Plaintiff's sole evidence is his sworn statement that he entered into an employment contract with Harper in reliance on these representations. That evidence is insufficient to establish that plaintiff was injured by his reliance. Plaintiff argues that injury is established by his loss of the earnings that defendants told him that he would make. However, because an action for fraud sounds in tort and not in contract, the plaintiff may recover only what he has actually lost, not what he was promised. *Collins v. McCombs*, 511 S.W.2d 745 (Tex. Civ. App. -- San Antonio 1974, writ ref'd n.r.e). Accordingly, plaintiff must show that he has passed up other, more lucrative opportunities in reliance on defendants' representations. He fails to do this. Therefore,

> the motion for summary judgment on plaintiff's claim of fraud is granted.

Petition for a Writ of Certiorari, APPENDIX A, Pages 6-7.

The Circuit Court reviewed Texas law and agreed with the trial court that Camp was required to provide evidence that he suffered injury as a result of his reliance upon a promise or representation in order to support his fraud or misrepresentation claim. The Circuit Court agreed that Texas law required that a plaintiff must show both "out-of-pocket damages" -- what he actually lost -- not loss of what he was promised or the loss of the benefit of the bargain. The Circuit Court noted that, with certain exceptions, the case law in Texas was clear that Texas law denies "benefit of the bargain" damages in fraud and misrepresentation actions. See Petition for a Writ of Certiorari, APPENDIX C, Pages 4-5, citing Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App. -- San Antonio 1974, writ ref'd n.r.e.) (fraud); Federal Land Bank Ass'n. of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991) (misrepresentation); George v. Hesse, 100 Tex. 44, 93 S.W. 107 (1906); Morris-Buick Co. v. Pondrom, 131 Tex. 98, 113 S.W.2d 889, 890 (1938).

The summary judgment record is clear that Camp did not act to his detriment upon any alleged representations of defendants. In the appellant's brief to the Circuit Court below, Camp admits that the unpaid commissions which were

allegedly promised constituted "benefit of the bargain" damages. Camp's effort to recover anticipated commissions does not sound in fraud, for the purpose of a fraud claim in Texas law is not to enforce a promise, but to provide compensation for actual "out-of-pocket" loss suffered as a result of a party's detrimental reliance upon another party's fraudulent representation. Collins, 511 S.W.2d at 747.

Before this Court, Camp claims that the Fifth Circuit Court of Appeals wrongfully applied Texas law by failing to consider whether Camp is entitled to "benefit of the bargain" commissions earned prior to his termination. For that principal of law, Camp cites Paniagua v. City of Galveston, Texas, 995 F.2d 1310, 1313 (5th Cir. 1993), and Pickell v. Brooks, 846 S.W.2d 421, 425 (Tex. App. -- Austin 1992, writ denied).

Although Camp's claims in the courts below have included claims for alleged commissions earned prior to and following his termination, Camp did not raise this argument or cite these authorities to the trial court or the Circuit Court. Even on motion for rehearing to the Circuit Court, Camp failed to notify the Circuit Court of its alleged error in this regard.

The cases cited by Camp in his Petition for a Writ of Certiorari do not contradict the great weight of authority cited by the Circuit Court which requires that there be "out-of-pocket" loss in order to support any claim for fraud or misrepresentation under the law of the

State of Texas. There is no distinction in the law of the State of Texas which allows recovery for "benefit of the bargain" damages prior to the termination, but not after the termination, of an employee.

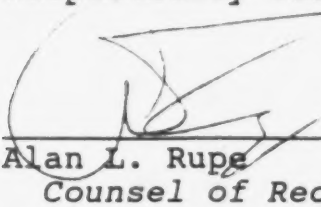
In fact, the Texas case cited by the petitioner, Pickell v. Brooks, supra, does not hold that an employee is entitled to "benefit of the bargain" commissions earned prior to termination. In that case, a parole caseworker employed by the Texas Board of Pardons and Paroles filed a lawsuit claiming due process violations when she was denied supervisory credit for time spent in her job. During the period of her employment, a memorandum was issued by her employer cutting off all credit for administrative experience in lieu of supervisory experience for consideration in job promotions. The employee had claimed vested property rights to the salary and benefits for the time she had already worked. But the Texas court stated that, "Under the at-will employment doctrine, the Board had the authority to modify the terms of her employment as it did in the May 24, 1988, memorandum approved by Heckmann." Pickell, 846 S.W.2d at 425. Thus, Pickell is no support for plaintiff's allegation of error in the application of Texas law to the facts of this case.

CONCLUSION

Since the Circuit Court has correctly determined and applied Texas state law to

the summary judgment evidence in this case, no substantial federal controversy is presented, and Camp's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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